BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

VICKIE HILDEBRANDT Claimant	)	
VS.	)	
URSULINE SISTERS, INC. Respondent	)	Docket No. 1,017,601
AND	)	
ZURICH AMERICAN INSURANCE CO. Insurance Carrier	)	

ORDER

Respondent requested review of the November 21, 2005 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on March 28, 2006.

APPEARANCES

Derek R. Chappell, of Ottawa, Kansas appeared for the claimant. Samantha N. Benjamin, of Kansas City, Kansas appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that the compensability of claimant's claim is no longer in dispute. The parties further agreed that the $465.00 in medical bills is no longer at issue. Finally, both parties stipulated that the average weekly wage found by the ALJ, $445.30, is acceptable and can be affirmed.

ISSUES

The ALJ awarded claimant a 56.5 percent work disability based upon a 100 percent wage loss and a 33 percent task loss, less 10 percent for a pre-existing impairment stemming from a 2001 work-related injury.

The respondent requests review of the nature and extent of claimant's impairment, particularly the work disability aspect of this claim. Respondent contends claimant's

May 18, 2004 accident led to nothing more than a temporary aggravation of a pre-existing condition. Respondent further argues that even if claimant's accident led to a permanent impairment, she failed to adequately and completely establish her task loss. Moreover, respondent believes the vocational testimony proves claimant has not made a good faith effort to find appropriate employment. And if she had made such an effort, she would have successfully found comparable employment, thus limiting her recovery in this matter to her functional impairment.

Claimant argues that the ALJ erred when he granted a 10 percent credit for a pre-existing impairment. Claimant does not dispute that she settled her 2001 workers compensation claim for a 10 percent functional whole body impairment. Rather, claimant contends that the rating report which respondent and the ALJ relied upon in assessing a pre-existing impairment was not properly within the record as its author, Dr. Prostic, did not testify in this case. And that neither physician who did testify provided an opinion as to the extent of claimant's pre-existing impairment. Accordingly, claimant's work disability should be 66.5 percent rather than the 56.5 percent, as assessed by the ALJ. In all other respects, claimant maintains her Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed in part and modified in part.

The ALJ's recitation of the facts of this case are complete and therefore, there is no need to repeat them herein. The Board, therefore, adopts that recitation as its own.

The Board further notes that claimant did not dispute respondent's right to pursue this appeal in spite of the delay in filing its notice of appeal to the Board. Following the ALJ's issuance of the Award, a copy was sent to the parties. Unfortunately, the respondent's copy of the Award was sent to an incorrect address and was never received by respondent. A notice of appeal was filed along with a Motion to file the Appeal Out of Time. Based on the principles set forth in *Nguyen*[1], the Board finds that respondent's Motion should be granted. Accordingly, the Board has jurisdiction to hear this matter.

The substantive issue to be decided in this case is two-fold. First, the Board must decide the nature and extent of claimant's functional impairment attributable to her 2004 accident, including her entitlement, if any, to a permanent partial general disability (a work disability in excess of the functional impairment). This issue requires examination of the task and wage loss evidence. Second, the Board must also consider whether respondent is entitled to a credit under K.S.A. 44-501(c) for claimant's alleged pre-existing impairment.

[1] *Nguyen v. IBP, Inc.*, 266 kan. 580, 972 P.2d 747 (1999).

Dr. Bieri testified that claimant sustained an additional 5 percent permanent partial impairment to the whole body based upon her SI joint disfunction and her right trochanteric bursitis, both conditions due to the May 18, 2004 accident. He further testified that her symptoms and resulting impairment are distinguishable from the injury and complaints she experienced following her 2001 accident. According to him, the 2001 accident involved primarily the low back with some complaints into both hips and right leg, while the 2004 accident involves the SI joint and bursitis to the right hip.

Dr. Galate originally agreed with Dr. Bieri's opinions and likewise assessed a 5 percent whole body impairment as a result of the May 18, 2004 accident. But following the issuance of his report, he was contacted by respondent's counsel and provided with additional medical records that pre-dated the accident. Included among these records were those generated by Dr. Prostic in connection with her 2001 accidental injury while working for another employer. Dr. Prostic's rating report included a permanent impairment assessment of 15 percent to the whole body along with restrictions.

Based upon that additional information, as well as a written request from respondent's counsel, he further opined that the 5 percent impairment pre-existed claimant's 2004 accident. After another written request from counsel, he further amplified that opinion to state that claimant's May 2004 accident created nothing more than a temporary aggravation of claimant's pre-existing condition. Thus, in his view, the permanent impairment attributable to the May 2004 accident was zero percent.

The ALJ concluded claimant had no new functional impairment following her May 18, 2004 accident while in respondent's employ. He made this finding based, in part, upon the functional impairment ratings offered by Dr. Bieri, who rated claimant at 5 percent whole body, and Dr. Galate, who initially rated claimant at 5 percent. The ALJ then compared those ratings against the functional impairment assigned by Dr. Prostic and her subsequent settlement for 10 percent to the whole body. And because the 5 percent was less than the previously assessed 10 percent the ALJ said "[t]his tends to show that the 2004 accident did not cause injury."[2]

The Board has considered the ALJ's finding with respect to functional impairment and concludes it should be modified. The ALJ's conclusion was based, in large part, on the fact that Dr. Prostic assessed 15 percent permanent whole body impairment for claimant's 2001 accident. However, Dr. Prostic's report should not have been considered. Absent a stipulation, K.S.A. 44-519 provides that a physician's report of examination is admissible evidence only when the physician testifies. In this instance, Dr. Prostic did not testify and claimant's counsel objected to this opinion when it was offered. Claimant's counsel also

[2] ALJ Award (Nov. 21, 2005) at 5.

objected when Dr. Prostic's rating report was utilized with Dr. Galate during his deposition. Neither Dr. Galate nor the ALJ should have considered Dr. Prostic's report. As such, the Board believes Dr. Bieri's opinions are more persuasive and finds that claimant has established that she sustained a 5 percent permanent partial impairment to the body as a whole and the Award is hereby modified to reflect this finding.

The ALJ correctly noted that claimant's back and hip injury are not contained within the schedule of injuries set forth in K.S.A. 44-510d. When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

That statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[5]

The ALJ concluded claimant's task loss was 33 percent, as opined by Dr. Bieri. This was the only task loss opinion contained within the record.[6] Respondent attacks this finding by suggesting that the task loss analyses by both claimant's expert, Michael Dreiling, and its own, Gary Weimholt, failed to take into consideration claimant's farming activities. According to respondent's counsel, "[u]nlike the statement made by Judge Hursh, there is **no requirement** that the job in question be a commercial job."[7] Thus, respondent argues the task loss analyses are incomplete and therefore unpersuasive.

The Board is unpersuaded by respondent's argument. While claimant may reside on a farm, own cattle and tend to her garden, there is no evidence that suggests that any of these activities have been a source of income for her in the past 15 years. The statute, K.S.A. 44-510e(a), refers to *substantial gainful employment* and the tasks involved in performing that employment. The statute does not refer to nor does it contemplate work done in furtherance of activities that do not generate income as work tasks for purposes of determining task loss.

Claimant has never made her living as a farmer or rancher. While it is true that she periodically sells cattle, there is no evidence that she makes any profit or income from that endeavor. Likewise, she tends her vegetable garden, but there is no evidence to indicate that she has ever sold produce from that garden. Thus, it appears from this record that those activities did not constitute substantial gainful employment. Respondent's argument might, under the right circumstances, justify the decision to disregard the task analysis. But in this instance, there is no reason to do so because the activities excluded from claimant's task list do not constitute tasks that were performed in furtherance of substantial gainful employment. Accordingly, the Board affirms the ALJ's determination that claimant sustained a 33 percent task loss based upon Dr. Bieri's testimony.

Turning now to the wage loss component, the ALJ found claimant's efforts met the "good faith" test and as such, her actual wage loss, that of 100 percent, was utilized for purposes of her work disability calculation. Respondent argues that claimant did not put

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[5] *Id.* at 320.

[6] Respondent offered the testimony of Gary Weimholt and while his report contains a task loss percentage based upon various physicians' restrictions, Mr. Weimholt is not a physician and is therefore, unqualified to issue a task loss opinion under K.S.A. 44-510e(a).

[7] Respondent's Brief at 11 (filed Jan. 17, 2005).

forth a good faith effort to find appropriate post-injury employment and had she done so, she would have found comparable employment, thus entitling her to only her functional impairment.[8]

At the regular hearing claimant testified to her post-injury job search efforts. Her search began in November 2004, even before she was released from her employment with respondent. Claimant resides in rural Ottawa, Franklin County, Kansas, and has looked for work in Ottawa, Paola, Pomona and Lawrence, Kansas. Her search efforts range from a low in November 2004 (3 attempts in the last week of November) to a high in June 2005 (26 attempts).

In April 2005, claimant met with Gary Weimholt, respondent's vocational expert, and he suggested that she increase the frequency of her job applications, register at the Kansas Job Service and also recommended specific employers where claimant should apply. It is uncontroverted that claimant followed each of Mr. Weimholt's suggestions, but she has yet to obtain employment.

The ALJ weighed the parties' respective arguments and concluded claimant's efforts satisfied the good faith requirement and therefore, the ALJ properly utilized her actual wage loss in computing her work disability. The Board finds no reason to disturb the ALJ's findings on wage loss. Claimant did not wait for respondent to terminate her when it was clear she would not be able to return to her position as an aide. She began looking for employment in late-November 2004, before she was terminated, and continued up to the date of the regular hearing. She accepted Mr. Weimholt's suggestions, registering with the Kansas Job Service and even followed up with the employers he recommended, all to no avail. Under these circumstances, the Board agrees with the ALJ and concludes claimant demonstrated a good faith effort to find appropriate post-injury employment.

In summary, the Board finds that claimant is entitled to a 5 percent whole body permanent functional impairment and a 66.5 percent work disability, which is comprised of a 33 percent task loss and a 100 percent wage loss.

As for the ALJ's conclusion that respondent was entitled to a credit for claimant's alleged 10 percent pre-existing permanent impairment, the Board finds that that conclusion should be modified.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

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[8] Mr. Weimholt testified that claimant could expect to find employment in the $8-10 per hour range while Mr. Dreiling testified that claimant could expect to find employment in the $6-8 per hour as a food service worker.

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[9]

And functional impairment is defined by K.S.A. 44-510e, as follows:

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Consequently, by definition the Act requires that pre-existing functional impairment be established by competent medical evidence and ratable under the appropriate edition of the AMA *Guides*, if the condition is addressed by those *Guides*.[10]

The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the pre-existing condition. Instead, the Act only requires that the pre-existing condition must have actually constituted a ratable functional impairment.

Furthermore, the Kansas Court of Appeals has recognized that previous settlement agreements and previous functional impairment ratings are not necessarily determinative of a worker's functional impairment for purposes of the K.S.A. 44-501(c) reduction. In *Mattucci*[11], the Kansas Court of Appeals stated:

> Hobby Lobby erroneously relies on *Baxter v. L.T. Walls Const. Co.*, 241 Kan. 588, 738 P.2d 445 (1987), and *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d 39, 611 P.2d 173 (1980), to support its position. In attempting to distinguish the facts of the present case, Hobby Lobby ignores that both Baxter and Hampton instruct that a previous disability rating should not affect the right to a subsequent award for permanent disability. *Baxter v. L.T. Walls Const. Co.*, 241 Kan. at 593; *Hampton v. Profession [sic] Security Company*, 5 Kan. App. 2d at 41. Furthermore, the *Hampton* court declared that "settlement agreements regarding a claimant's percentage of disability control only the rights and liabilities of the parties at the time of that settlement. The rating for a prior disability does not

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[9] K.S.A. 44-501(c).

[10] See *Watson v. Spiegel, Inc.*, No. 85,108 (Kansas Court of Appeals unpublished opinion filed June 1, 2001).

[11] *Mattucci v. Western Staff Services and Hobby Lobby Stores, Inc.*, Nos. 83,268 and 83,349 (Kansas Court of Appeals unpublished opinion filed June 9, 2000).

establish the degree of disability at the time of the second injury." 241 Kan. at 593.

In this instance, the only evidence of a pre-existing impairment is contained within Dr. Prostic's report issued in connection with claimant's 2001 injury. And there is persuasive evidence that the earlier injury was to a different area of claimant's back than was involved in the 2004 accident. Neither Dr. Galate or Dr. Bieri issued an independent opinion as to claimant's pre-existing impairment. As explained earlier, Dr. Prostic's report should not have been considered as it was inadmissible under K.S.A. 44-519. Even if that report were admissible, there is no indication that his opinion as to impairment was made pursuant to the A.M.A. *Guides*, as required by the Act. It follows then that the record is devoid of any evidence which would allow the finder of fact to determine the nature and extent of any pre-existing condition. For this reason, the Board finds the ALJ's decision to grant respondent a credit was in error. Claimant's work disability is 66.5 percent and is not subject to a credit under K.S.A. 44-501(c).

The ALJ's decision to order the respondent to pay claimant's $465 medical bill is also affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated November 21, 2005, is affirmed in part and modified in part.

The claimant is entitled to 15.28 weeks of temporary total disability compensation at the rate of $296.88 per week or $4,536.33 followed by 0.14 weeks of permanent partial disability compensation at the rate of $296.88 per week or $41.56 for a 5 percent functional disability followed by 275.65 weeks of permanent partial disability compensation at the rate of $296.88 per week or $81,834.97 for a 66.50 percent work disability, making a total award of $86,412.86.

As of April 6, 2006 there would be due and owing to the claimant 15.28 weeks of temporary total disability compensation at the rate of $296.88 per week in the sum of $4,536.33 plus 83.01 weeks of permanent partial disability compensation at the rate of $296.88 per week in the sum of $24,644.01 for a total due and owing of $29,180.34, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $57,232.52 shall be paid at the rate of $296.88 per week for 192.78 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Derek R. Chappell, Attorney for Claimant
Samantha N. Benjamin, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director